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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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No.

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LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; AND UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, pray that a writ of certiorari issue

to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 22, 1960.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 699 (*infra*, pp. 1a-7a). The decision and order of the National Labor Relations Board are reported at 122 NLRB No. 51 (R. 3-15).

## JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1960 (*infra*, p. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, based solely upon a finding that employment at a construction job was by agreement limited exclusively to union members referred by a particular local union or district council, the Board may require that the unions refund to the employees "dues, nonmembership dues, assessments, and work permit fees" received by the unions from the employees.

## STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), provides in pertinent part that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist

from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

## STATEMENT

Mechanical Handling Systems, Incorporated, manufactures, designs, and installs conveyors and allied equipment, (R. 17). It has an agreement with petitioner United Brotherhood "to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 18).

On January 4, 1957, Mechanical Handling began a job at the plant of the Ford Motor Company in Indianapolis (R. 19). Two or three days later a business representative of petitioner District Council visited the job (R. 19). The business representative and the employer's superintendent agreed to hire millwrights and carpenters upon referral from petitioner Local 60 (R. 19-20). In practice employment at the Ford job was secured solely through referral or clearance from Local 60 or the District Council (R. 20, 22, 26).

Two applicants for employment at the Ford job were members of another local union, located at Louisville, Kentucky, affiliated with United Brotherhood (R. 68, 78). Both had formerly worked for the employer at a job in Louisville (R. 69, 78). They travelled from Louisville to Indianapolis and applied for employment at the Ford job (R. 68-69, 79). The employer declined

to hire them because they were unable to secure referral from Local 60 or the District Council (R. 22-24). It appears that they were denied referral "because . . . too many men" were unemployed in the Indianapolis area and "we were out-of-town men and we couldn't expect to come in the district and go to work" (R. 86).

The Board found that petitioners "violated Sections 8(b)(1)(A) and 8(b)(2) of the Act in maintaining and enforcing an agreement which established closed shop preferential hiring conditions", and "by causing or attempting to cause the Company to refuse to hire" the two applicants (R. 8).[1] In addition to other relief the Board ordered that petitioners (R. 10-11):

> Reimburse all employees of Mechanical Handling Systems, Incorporated, in the full amount for all monies illegally exacted from them provided, however, that this Order shall not be construed as requiring reimbursement for any such dues, non-membership dues, assessments, and work permit fees collected more than 6 months prior to the date of service of the original charge against each Respondent herein.

In explanation of the refund requirement, the Board stated that (R. 9):

> Furthermore, as we find that dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

[1] United Brotherhood was not found to have violated Section 8(b)(1)(A) and (2) by causing one of the two applicants to be refused hire because this applicant had not filed a charge against United (R. 8 and n. 2).

> In addition, therefore, we shall order the Respondents, jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment. These remedial provisions, we believe, are appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The trial examiner had declined to recommend a refund order, stating that exaction of moneys was "not in any way proven"; he described the General Counsel's basis for requesting a refund as "merely . . . a shot gun blast aimed in the general direction of quarry hoping that game will be brought down" (R. 27).

The Court of Appeals enforced the refund requirement, stating that "we find reimbursement of fees to be a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices" (*infra*, p. 6a).

## REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions of the Courts of Appeals for the Second,[2] Third,[3] Fifth,[4] Ninth,[5] and District of Columbia[6] Circuits. In those

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[2] *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 45 LRRM 2876 (March 3, 1960); *Building Material Teamsters, Local 282* v. *National Labor Relations Board*, 45 LRRM 2879 (March 3, 1960).

[3] *National Labor Relations Board* v. *American Dredging Co.*, 45 LRRM 2405 (January 8, 1960).

[4] *National Labor Relations Board* v. *Local Union No. 85, Sheet Metal Workers' International Association*, 45 LRRM 2661 (February 11, 1960).

[5] *Morrison-Knudsen Co.* v. *National Labor Relations Board*, 45 LRRM 2907 (February 19, 1960).

[6] *Local 357, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 45 LRRM 2752 (February 18, 1960).

cases, as here, the Board found, and the courts agreed,[2] that employment was based on a discriminatory hiring procedure. In those cases, as here, the Board ordered the refund of union dues and fees to the employees subject to the procedure in reliance exclusively upon the finding that hiring pursuant to it was discriminatory. But in those cases, unlike here, the Courts of Appeals set aside the refund requirement.

The Third Circuit stated that reimbursement is "a windfall to the employees and an unjust penalty . . ." (45 LRRM at 2406). The Fifth Circuit stated that it was "punitive rather than compensatory" (45 LRRM at 2663). The District of Columbia Circuit stated that "it goes too far . . ." (45 LRRM at 2753). The Second Circuit stated that it was "unduly harsh and penal in nature" (45 LRRM 2878), "inappropriate and arbitrary" (*id.* at 2879), and entered "more or less routinely and with regular incantation of the same words . . ." (*id.* at 2882). And the Ninth Circuit stated that it "is punitive, penal, non-remedial and an unauthorized requirement of payment to third persons not shown to have been in any manner damaged by the asserted unfair labor practice" (45 LRRM at 2917).

2. The importance of the question is manifest. This Court heretofore granted the writ to review the question whether, based exclusively on a finding that a union shop agreement was originally executed at a time when the contracting union did not have a majority, the Board may require the employer and the union to reimburse the employees for the union dues

[2] However, the Court of Appeals for the Ninth Circuit held that the evidence did not support a finding of a discriminatory hiring procedure, but concluded alternatively that, even if it did, the omnibus refund order could not stand (45 LRRM at 2915).

and initiation fees remitted by the employer to the union pursuant to the individual check-off authorization of each employee; the period of the refund to run for the term of the original and all succeeding union shop agreements beginning six months preceding the filing of the charge. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *National Labor Relations Board*, No. 44, October Term 1959, decision pending at this writing. In the instant case the Board does not even relate the refund of dues and fees to their collection pursuant to the terms of a union shop agreement requiring their payment.

In the current version of the refund remedy exemplified by this case, as the then General Counsel of the Board has explained, what the Board has done "was to extend the board reimbursement order, theretofore reserved for Section 8(a)(2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101, 102. In the Board's view nothing is relevant but the existence of a discriminatory hiring procedure. Given such a procedure, according to the Board, employees are "inevitably coerced" to pay moneys to the union; "the existence of an unlawful contract is sufficient in and of itself to establish the element of coercion"; the refund remedy is therefore without more "applicable to all closed shop and exclusive hiring agreements, . . . whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB No. 167, 44 LRRM 1138, 1139; see also, *Local 244, Motion Picture Operators Union*, 126 NLRB No. 46, 45 LRRM 1318. The irrelevance of "actual exaction" is a logical consequence of

the Board's view. For, as it has explained, the purpose of the current refund remedy is to provide "a deterrent" to violations and "an incentive" to compliance (*Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224):

> . . . we believe that a mere cease and desist order will have little impact in an industry where illegal hiring practices are widespread. The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance.

The Board's rationale is at war with settled limitations upon its exercise of remedial power. A remedy must be "adapted to the situation calling for redress" (*National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453, 463); "only actual losses should be made good" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198); the Board's "power to command affirmative action is remedial, not punitive" (*Consolidated Edison Corp.* v. *National Labor Relations Board*, 305 U.S. 197, 236); and "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act" (*Republic Steel Corp.* v. *National Labor Relations Board*, 311 U.S. 7, 12). In the light of these limitations, the validity of the Board's widely-applied current version of the refund remedy, bottomed as it is exclusively upon the existence of a discriminatory hiring procedure, is at the least in serious doubt. To resolve this important and recurrent question, and to settle the conflict in the circuits, determination by this Court is required.

## CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS X. WARD
WILLIAM A. MCGOWAN
222 E. Michigan Street
Indianapolis 4, Indiana

BERNARD DUNAU
912 Dupont Circle
Building, N. W.
Washington 6, D. C.

*Attorneys for Petitioners.*

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